G. R. S. [X-5]

Previous references.

1921.

(Mar)

File No. 467

Serial Nos. 1-2

Later references.

GENERAL AND REVENUE SECRETARIAT.

Serial Nos.

Part B for Jany 22

SUBJECT.

appeal to the Privy Council agt the decision of the Hon'ble High Court Judicature Madras reversing the claim of one Mr. P Balasa Iyer in a suit against lessee of certain property of the late Muthuswamy at Madura

Mr. Ramachandra Iyer

in C.S. 867-97 73 of 1922.

Sanctioning additional fee of Rs 500/- to the Advocate to ____

WD 1888—GPB—16,826—23-7-21

2528)

Office of the Huzrai Superintendent in Mysore.

467-21

Note.

Appeal to the Privy Council against the decision of the High Court of Judicature, -- Madras recognizing the claims of one Mr. P. Balasami Iver as a permanent lessee of certain properties of the Sri Vyasaravaswami at Madura

---

In Government Order No. 2513/F.155-16 6 dated 17th March 1917, sanction was accorded for appealing to the Privy Council, against the decision of the High Court, Madras on the above subject and in Government Order No. 3635-6/F 693-13-2 dated 23rd May 1919, the Huzrai -- Superintendent's recommendation to engage the services of a Senior Counsel was approved. Mr. Upjohn, K.C., who at first accepted the engagement expressed at a later stage doubts about our chances of success and returned the brief. The services of Mr. Clauson, K.C., a leading counsel, were thereupon secured. The appeal having come on for hearing in February 1921, their Lordships of the Privy Council reversed the judgment of the High Court and allowed the appeal, a result very favourable to the Matha. A copy of the judgment is submitted.

2. The order of the Privy Council in the case has been transmitted to the Temporary Sub Court of Madura by the High Court of -- Madras for execution. Steps are being taken

taken for the recovery of the possession of the lands and the compensation amount given to Mr. Balasami Iyer in the Land Acquisition case. Application has also been made to the High Court for the return of the 3½ per cent Government Pro-notes of the face value of Rs.4,500/- deposited by us as security in the Privy Council appeal.

A copy of the bill of costs as taxed by the Taxing Officer of the Privy Council has also been received and necessary action to realize our costs from the respondent Balasami Iyer will be taken.

3. Mr. T. Narasimha Iyengar, High Court Vakil, who conducted the case in the High Court at Madras was requested to do the needful to engage the services of solicitors and to do everything else necessary for -- filing and presenting the appeal before the Privy Council. Except the sum of Rs.500/- sanctioned in Government Order No.2395-6/ M.F.155-16-3 dated 27th March 1917 and paid to Mr. T. Narasimha Iyengar to move the High Court for leave to appeal, nothing has been paid to him till now for such services. He represents that his duties and responsibilities were very heavy as he had to attend to all the work in the High Court, engage solicitors in London, maintain correspondence with them and send them written memoranda by way of instructions to our Counsel and that he did not stipulate his fee at the beginning as we had failed in the High Court and as

as doubtless were also then entertained about our success in the Privy Council. Mr. Narasimha Iyengar requests therefore that an additional sum of Rs.500/- may be paid to him, making in all Rs.1000/- for the work including the services he rendered in the High Court after the disposal of the first appeal. Mr. T. Lakshminarasimha Rao who was consulted writes in his letter dated 22nd October 1921 as follows:--

"Regarding fees payable to London Solicitors and Mr. Narasimha Iyengar, I think we have to pay it and I mentioned this to His Holiness also and he agreed to all reasonable charges ~~as will be~~". should be paid."

4. I am of opinion that the request of Mr. T. Narasimha Iyengar is reasonable and accordingly solicit the sanction of Government for the payment of an additional fee of Rs.500/- to him in full settlement of all his claims, the charge being met from the funds of the Institution.

5. The accounts connected with the suit will be closed and all outstanding advances adjusted as early as practicable.

U Appanna Ayya

Huzur Superintendent.

D.F./19-11-21.

21-11-21

The Copy of the Privy Council Judgt. was received from Mr. T. Lakshminarasimha Rao Bahadur 21/22/12/21

G.R.S. VI-71]

SUBJECT.... ... .

. . . .

... .

Diary No. of letter replied to ...2528...

Section

File No.

Serial No. 2

General and Revenue Secretariat

(May)

, *the* 191 .

Proceedings of the Government of
His Highness the Maharaja of Mysore.

3814-9

Date of issue...23. 1- 923...

Read.— Note dt 21-11-21 of the Mysore Suptdt in Mysore in the matter of the Appeal preferred to the Privy Council against the decision of the Madras High Court recognizing the claims of one Mr P. Balasami Iyer as a permanent Lessee of certain properties of ~~Order Thereon:-~~ the Sri Vyasaraya Swami at Madura.-

(Please type the note here in extenso)

Signed by...

May this be

i Printed?

ii treated as a standing order?

iii published in the Gazette English part?

iv translated?

v placed at the disposal of the press?

vi published in the Gazette Kannada part?

over.

3868-9.

Order:- Judl. 467-21-2 dt 23-1-22.

Under the circumstances reported by the Mysore Supdt., Govt. are pleased to sanction the payment of an additional fee of Rs 500 to Mr T. Narasimhiengar, High Court Vakil, ~~who conducted~~ Madras, in full settlement of all his claims, the charge being met from the funds of the Matha

23/1/22

Secretary
Mysore Dept.

SD
20/1/22

The Mysore Supdt. in Mysore
Comm. to Govt.

List of enclosures.

Copied by

Examined by

Privy Council Appeal No. 48 *of* 1919.

Sri Vidya Varuthi Thirtha Swamigal - - - - *Appellant*

v.

Balusami Ayyar and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH JULY, 1921.

Present at the Hearing:
LORD BUCKMASTER.
LORD DUNEDIN.
LORD SHAW.
MR AMEER ALI.

[*Delivered by* MR. AMEER ALI]

The suit that has given rise to this appeal relates to certain lands lying in the town of Madura in the Madras Presidency which admittedly belong to an old Mutt (Math) situated within the Mysore State. The origin, development, and *raison d'être* of these Mutts have been discussed in a number of cases decided in the Madras High Court to some of which their Lordships propose to refer in the course of this judgment. In their general characteristics they are almost identical with similar institutions in Northern India and in the Bombay Presidency. The heads of these foundations bear different designations in respect of the rights and incidents attached to the office; the difference arises from the customs and usages of each institution. The superior of this particular Mutt has been called in these proceedings Matathipathe and sometimes Pandara Sannadhi, which their Lordships understand connote the same idea of headship. At the time this action was brought, the 26th defendant held the office of Matathipathe. He has since died and the present appellant is the head of the institution. In 1891 one Srinivasa was the Matathipathe and he on the 17th March of that year

granted to the 2nd plaintiff, a near relative, a permanent lease of the lands in suit, on a small quit rent of Rs 24 a year. Shortly after the grant of the lease Srinivasa died, and was succeeded by one Samudra who held the office until 1906 On his death the now deceased defendant No 26 became the head In 1902 the 2nd plaintiff sub leased the lands to the 1st and 2nd defendants for a period of ten years

Since 1905 the Mutt has been under the management of the Mysore State under a power of attorney executed at first by the Matathipathe Samudra and afterwards by his successor in favour of the Dewan and his successors in office About the same time the 2nd plaintiff conjointly with his son (the 3rd plaintiff) assigned their right and interest in the lands in suit to the 1st plaintiff It is in evidence and so far as appears from the judgments of the two Courts in India does not appear to be contradicted, that it was only in 1908 that the representative of the Dewan acting under the power granted by the Matathipathe became aware of the transaction of 1891 under which the plaintiffs claim title The sublease created in 1902 by the 2nd plaintiff in favour of the 1st and 2nd defendants was to have expired in 1912 But before its expiry they obtained a lease for 17 years from the representative of the Dewan They are now in possession of the lands in suit under this lease The plaintiffs are and were at the time they brought their suit on the 5th March 1913 in the Court of the Subordinate Judge of Madura, admittedly out of possession. The present action is for declaration of title and for ejectment and possession principally directed against the Matathipathe as the head of the Mutt and the 1st and 2nd defendants lessees holding possessions under him The other defendants have been joined as parties apparently in consequence of certain rights they possess or exercise under those defendants

The plaintiffs base their title on two grounds Firstly, that the permanent lease under which they claim was created under circumstances that would bind not only the grantor but all his successors, and secondly, that even if the lease was not valid they had acquired a title under the Statute of Limitation by adverse possession for over twelve years from the date of the grant

Their case throughout has been that Srinivasa was a "trustee" and that all his successors are "trustees," that the lands were granted on a "specific" trust, and that consequently under Art. 134 of the 2nd schedule of the Indian Limitation Act (IX of 1908) they have acquired a good title against the Mutt.

The Matathipathe controverted both allegations. He denied that the alienation by Srinivasa was of such a character as would bind the Mutt, he further denied that he and his predecessors were 'trustees' of the Mutt or that the 2nd plaintiff or his assignee had acquired any right to the Mutt lands by adverse possession. On these contentions, two points arose for determination which are embodied in the first two issues. The Trial Judge after giving the substance of the 2nd plaintiff's evidence

and of the other witnesses, formulates the position which the pleader took up.

> "He contends," says the learned Judge, ' that the plaint property is trust property set apart for the worship of the titular deity of the Mutt that the head of the Mutt is a trustee merely, and that the permanent lease to 2nd plaintiff is an alienation of Mutt property and that 26th defendant at this distance of time could possibly have no right to such property. The alienation being *ab initio* void, the 26th defendant had no right to plaint property as he succeeded only in 1906 and 1st plaintiff had perfected his title by adverse possession for over twelve years '

The Subordinate Judge negatived this contention, he held upon the admissions of the 2nd plaintiff that the property in suit was "ordinary Mutt property" and was not set apart on any specific trust; that the head of the Mutt was not a "bare trustee," as it was admitted that the income was at his absolute disposal and that "none had a right to question him about it."

He found also that the 2nd plaintiff took the lease with full knowledge of the character of the endowment and had learnt on enquiry that "he could not safely purchase it."

With regard to the question of estoppel arising from the alleged acceptance of rent by the 26th defendant as the plaintiffs contended, the Subordinate Judge held :—

> ' In fact the 1st plaintiff never paid money as rent and the 26th defendant or his agent never accepted payment with knowledge that the payment was as rent for plaint property In these circumstances, I find that these defendants are not estopped from denying plaintiff's title I find this issue against plaintiffs "

He accordingly dismissed the suit save and except in respect of a money claim against the 1st and 2nd defendants.

The plaintiffs appealed to the High Court of Madras, which reversed the Trial Judge's order and decreed the claim. The learned Judges do not negative the finding of the first Court that the 2nd plaintiff took the lease with notice. But they considered that the matter in dispute fell within Art. 134 referred to above. They summed up their conclusion in the following words: "that the lessor intended to grant, and the lessee intended to acquire, an interest greater than the transferor was competent to alienate, and all the requirements of Art. 134 have been complied with."

The findings of the learned Judges on the issue relating to limitation and the acquisition of right by adverse possession require notice. They deal first with the question of justifiable necessity, which they decide against the plaintiffs. They say "there is no doubt that the head of a Mutt cannot in the absence of necessity bind his successors in office by a permanent lease at a fixed rent for all time." And then add: "There is no allegation, much less proof, of any such necessity. The first contention must be rejected."

They then proceed to discuss the nature of the endowment in question and the position of its head. Their finding on this point is important; they say as follows :—

> "In connection with the second point a question arises as to the nature of the endowment and the position of the head of the Mutt in relation to it

The exact terms of the original grant are not in evidence It was conceded in argument that the grant was made by one of the Naicken dynasty of Madura The case for the appellants is that the endowment was for a specific purpose *i e* for the worship of Gopalakrishnaswami, who is described by defendants 1st witness is the titular deity of the Mutt The evidence does not support this contention and it has been found against in the Lower Court A statement made by a local agent of the Mutt during the Inam Commission inquiries is relied upon for the appellants It was apparently unsupported by any documentary evidence The description of the Inam as given at the close of the inquiry is that it was granted for the support of Vyasarya Matam (Exhibit L) Compare also description in Exhibit F The evidence for the defendants is that the income from this property is not appropriated to any particular purpose but forms part of the general funds of the Mutt I think the grant must be held to have been made for the general purposes of the Mutt

They thus concur with the first Court that there was no "specific trust which was the foundation of the plaintiff's case. But after examining some of the judgments of their own Court, they apparently felt constrained to hold that the decision of this Board in *Ram Parkash Das* v *Anand Das** had crystallised the law on the subject and definitely declared the Mohant to be a 'trustee" It is to be observed that in that case the decision related to the office of Mohant but in the course of their judgment their Lordships conceived it desirable to indicate *inter alia* what upon the evidence of the usages and customs applicable to the institution with which they were dealing, and similar institutions, were the duties and obligations attached to the office of superior ; and they used the term 'trustee' in a general sense, as in previous decisions of the Board by way of a compendious expression to convey a general conception of those obligations. They did not attempt to define the term or to hold that the word in its specific sense is applicable to the laws and usages of the country. As pointed out by their predecessors in *Greedhari Doss* v. *Nundkissore Doss*† ' The only law as to these Mohants and their functions and duties is to be found in custom and practice, which is to be proved by testimony." Generally speaking, however, the duties and obligations resting on the superior indicated in *Ram Parkash Das* v. *Anand Das* do not seem to vary In this particular institution the position of the Matathipathe in relation to the Mutt was clearly established by testimony and concurrently found by both Courts. But the learned Judges misapprehended their Lordships' judgment and proceeded to hold that as Srinivasa who granted the permanent lease was a 'trustee,' his act fell under Art. 134. To this Article their Lordships will presently refer. Before doing so, however, they consider it necessary to observe that there are two systems of law in force in India, both self-contained and both wholly independent of each other, and wholly independent of foreign and outside legal conceptions. In each there are well-recognised rules relating to their religious and charitable institutions. From

* L R 43 I A 73.

† 11 Moo. I.A., p. 405, at p. 428.

the year 1774 the Legislature, British and Indian, has affirmed time after time the absolute enjoyment of their laws and customs so far as they are not in conflict with the statutory laws, by Hindus and Mahommedans. It would, in their Lordships' opinion, be a serious inroad into their rights if the rules of the Hindu and Mahommedan laws were to be construed with the light of legal conceptions borrowed from abroad, unless perhaps where they are absolutely, so to speak, *in pari materia*. The vice of this method of construction by analogy is well illustrated in the case of *Vidyapurna Swami* v. *Vidyanidhi Swami*,* where a Mohant's position was attempted to be explained by comparing it with that of a bishop and of a beneficed clergyman in England under the ecclesiastical law. It was criticised, and rightly, in their Lordships' opinion, in the subsequent case, which arose also in the Madras High Court, of *Kailasam Pillai* v. *Nataraja Thambiran*.† To this judgment their Lordships will have to refer further later on.

It is also to be remembered that a "trust" in the sense in which the expression is used in English law, is unknown in the Hindu system, pure and simple.‡ Hindu piety found expression in gifts to idols and images consecrated and installed in temples, to religious institutions of every kind, and for all purposes considered meritorious in the Hindu social and religious system; to Brahmins, *Goswamis*, *sanyasis*, etc. When the gift was to a holy person, it carried with it in terms or by usage and custom certain obligations. Under the Hindu law the image of a deity of the Hindu pantheon is, as has been aptly called, a "juristic entity," vested with the capacity of receiving gifts and holding property. Religious institutions, known under different names, are regarded as possessing the same "juristic" capacity, and gifts are made to them *eo nomine*. In many cases in Southern India, especially where the diffusion of Aryan Brahmanism was essential for bringing the Dravidian peoples under the religious rule of the Hindu system, colleges and monasteries under the names of Mutt were founded under spiritual teachers of recognised sanctity. These men had and have ample discretion in the application of the funds of the institution, but always subject to certain obligations and duties, equally governed by custom and usage. When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, he is only the manager and custodian of the idol or the institution. In almost every case he is given the right to a part of the usufruct, the mode of enjoyment and the amount of the usufruct depending again on usage and custom. In no case was the property conveyed to or vested in him, nor is he a "trustee" in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense for mal-administration.

* I.L. 27, Mad. 435.

† I.L. 33, Mad. 265.

‡ J. C. Ghose, "Hindu Law," p. 276

The conception of a trust apart from a gift was introduced in India with the establishment of Moslem rule. And it is for this reason that in many documents of later times in parts of the country where Mahommedan influence has been predominant, such as Upper India and the Carnatic, the expression *wakf* is used to express dedication

But the Mahommedan law relating to trusts differs fundamentally from the English law It owes its origin to a rule laid down by the Prophet of Islam, and means the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings When once it is declared that a particular property is *wakf*, or any such expression is used as implies *wakf* or the tenor of the document shows, as in the case of *Jowan Doss Sahu* v *Shah Kubeeruddin*,* that a dedication to pious or charitable purposes is meant the right of the *wakif* is extinguished and the ownership is transferred to the Almighty The donor may name any meritorious object as the recipient of the benefit The manager of the *wakf* is the *Mutwalli* the governor superintendent or curator In *Jowun Doss Sahu's* case the Judicial Committee call him "procurator" It related to a *Khankah* a Mahommedan institution analogous in many respects to a Mutt where Hindu religious instruction is dispensed The head of these *Khankhas* which exist in large numbers in India is called a *sajjâda-nashin* He is the teacher of religious doctrines and rules of life and the manager of the institution and the administrator of its charities and has in most cases a larger interest in the usufruct than an ordinary *Mutwalli* But neither the *sajjada nashin* nor the *Mutwalli* has any right in the property belonging to the *wakf*, the property is not vested in him and he is not a 'trustee' in the technical sense

It was in view of this fundamental difference between the juridical conceptions on which the English law relating to trusts is based and those which form the foundations of the Hindu and the Mahommedan systems that the Indian Legislature in enacting the Indian Trusts Act (II of 1882) deliberately exempted from its scope, the rules of law applicable to *wakf*, and Hindu religious endowments. Section 1 of that Act, after declaring when it was to come into force and the areas over which it should extend "in the first instance," lays down "but nothing herein contained affects the rules of Mahommedan law as to *wakf*, or the mutual relations of the members of an undivided family as determined by any customary or personal law, or applies to public or private religious or charitable endowments . . ." Section 3 of the Act gives a definition of the word "trust" in terms familiar to English lawyers. It says:—

> A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him for the benefit of another or of another and the owner the person who reposes or declares the confidence is called the

* 2 M I A, 390

> 'author of the trust'; the person who accepts the confidence is called the 'trustee'; the person for whose benefit the confidence is accepted is called the 'beneficiary'; the subject-matter of the trust is called 'trust-property' or 'trust-money'; the 'beneficial interest' or 'interest' of the beneficiary is his right against the trustee as owner of the trust-property; and the instrument, if any, by which the trust is declared is called the 'instrument of trust.'"

In this connection it may be observed that in the case of *Muhammad Rustam Ali* v. *Mushtaq Husain*,* the dedication was of specific property created by an instrument called a "trustee-namah." Lord Buckmaster, delivering the judgment of the Board, dealt thus with the objection as to the validity of the document:—

> "It is argued," said the noble lord, "that the 'trustee-namah' must have dealt with an interest in immovable property for otherwise the trustees could have no right to maintain the suit, and such an argument at first sight makes a strong appeal to those who are accustomed to administer the English law with regard to trustees. It needs, however but a slight examination to show that the argument depends for its validity upon the assumption that the trustees of the wakf-nama in the present case stand in the same relation to the trust that trustees to whom property had been validly assigned would stand over here. Such is not the case. The wakf-nama itself does not purport to assign property to trustees."

In 1810 in the Bengal Presidency, and in 1817 in the Madras Presidency, the British Government had assumed control of all the public endowments and benefactions, Hindu and Mahommedan, and placed them under the charge of the respective Boards of Revenue. In 1863, under certain influences to which it is unnecessary to refer, the Government considered it expedient to divest itself of the charge and control of these institutions, and to place them under the management of their own respective creeds. With this object, Act XX of 1863 was enacted: a system of Committees was devised to whom were transferred the powers vested in Government for the appointment of "managers, trustees and superintendents"; rules were enacted to ensure proper management and to empower the superior court in the District to take cognisance of allegations of misfeasance against the managing authority. Their Lordships are not giving a summary of the Act, but indicating only its general features. The Act contains no definition of the word "trustee", it uses indifferently and indiscriminately the terms "manager, trustee or superintendent," clearly showing that the expressions were used to connote one and the same idea of management. After the enactment of 1863, the Committees, to whom the endowments were transferred, were vested, generally speaking, with the same powers as the Government had possessed before in respect of the appointment of "managers, trustees or superintendents."

Article 134 of the 2nd Schedule to the Indian Limitation Act (IX of 1908) is in these terms:—"To recover possession of

* L.R. 47, Ind. App., 224.

immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for valuable consideration," the period prescribed for the institution of the suit is twelve years " from the date of transfer. ' In the old Act XV of 1877 the words were " purchased from the trustee or mortgagee." The alteration was made with the object of including permanent leases in transactions of the character contemplated in the Article.

Article 134 is, as pointed out in *Abhiram Goswami's** case, controlled by Section 10 of the Limitation Act, which runs thus .—

> " Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time "

The language of Section 10 gives the clue to the meaning and applicability of Art. 134 It clearly shows that the Article refers to cases of specific trust, and relates to property " conveyed in trust Neither under the Hindu Law nor in the Mahommedan system is any property ' conveyed to a *shebait* or a *mutwalli*, in the case of a dedication Nor is any property vested in him ; whatever property he holds for the idol or the institution he holds as manager with certain beneficial interests regulated by custom and usage Under the Mahommedan Law, the moment a *wakf* is created all rights of property pass out of the *wâkif*, and vest in God Almighty The curator whether called *mutwalli* or *sajjadanashin*, or by any other name, is merely a manager. He is certainly not a ' trustee ' as understood in the English system

In *Sammantha Pandana* v *Sellapa Chetti* † the position of the superior in relation to the properties of the *Mutt* was laid down in terms which have an important bearing on the present case The learned Judges say there —

> " The property is in fact attached to the office and passes by inheritance to no one who does not fill the office It is in a certain sense trust property it is devoted to the maintenance of the establishment but the superior has large dominion over it, and is not accountable for its management nor for the expenditure of the income, provided he does not apply it to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution Acting for the whole institution he may contract debts for purposes connected with his mattam and debts so contracted might be recovered from the mattam property and would devolve as a liability on his successor to the extent of the asset received by him "

The origin and nature of these *Mutts* were again considered at great length in a case which arose in the same Court in 1886 In this case (*Gyana-Sambandha* v *Kandasami* ‡) the learned Judges pronounced that the head of the institution held the *mattam* under his charge, and its endowment in trust for the maintenance of the

* 36 I.A , 148
† I.L, 2 Mad. p 175
‡ I L 10 Mad 375

Mutt, for his own support, for that of his disciples, and for the performance of religious and other charities in connection therewith according to usage. An almost identical question came up for consideration in 1904 in *Vedyapurna Tirtha* v. *Vidyandhi Tirtha* already referred to.* In this case the learned Judges, after an elaborate examination of English institutions which they conceived to be analogous to Hindoo *Mutts*, came to the conclusion that whilst a *dharma karta* of a temple who has specific duties to perform might be regarded as a trustee, the superior of a *Mutt* is not a trustee but a " life-tenant."

The same question in another form came up again for consideration in 1909 before a Divisional Bench of the Madras High Court in the case of *Kailsam Pillai* v. *Nataraja Thambiran*.† The learned Judges before whom the point arose considered that the view taken in *Vidyapurna* v. *Vidyanidhi* was in conflict with that propounded in the two earlier cases‡ and referred the question to a Full Bench. The reference was in these terms : " Does the head of a *Mutt* hold the properties constituting its endowment as a life-tenant or as a trustee ?"

The Officiating Chief Justice expressed his opinion in the following terms :—

> I think, then, that it cannot be predicated of the head of a *Mutt*, as such, that he holds the properties constituting its endowments as a life-tenant or as a trustee The incidents attaching to the properties depend in each case upon the conditions on which they were given, or which may be inferred from the long-continued and well-established usage and custom of the institution in respect thereto."

Mr. Justice Wallis substantially agreed in this view.

Mr. Justice Sankaran Nair pointed out that in the case of these *Mutts* :—

> " Any surplus that remains in the hands of the Pandara Sannadhi, he is expected to utilise for the spiritual advancement of himself, his disciples or of the people But his discretion in this matter is unfettered He is not accountable to anyone and he is not bound to utilise the surplus He may leave it to accumulate "

And he further added, " It is also true in my opinion that he is under a legal obligation to maintain the *Mutt*, to support the disciples and to perform certain ceremonies which are indispensable. That will be only a charge on the income in his hands and does not show that the surplus is not at his disposal." In the result, he was of opinion " that in the absence of any evidence to the contrary, the Pandara Sannadhi (the superior) as such is not a trustee. He is not also a life-tenant for the reasons already stated." All three Judges agreed in thinking that if any specific property was specifically entrusted to the head for specific purposes he might be regarded a " trustee " with regard to that property ; but that in the absence of any such evidence

* I L. 27 Mad., 435

† I L. 33 Mad., 265.

‡ I.L. 2 Mad., 175, and I.L. 10 Mad , 375

the superior was not a trustee in respect of any part of the endowment.

The point came up for discussion again in a concrete form in 1913 in *Muthusamiar* v. *Sreemathamthi*,* where the exact point for decision was the question of limitation. The facts which gave rise to the litigation were almost identical with the present case before their Lordships, with this difference, that the suit there was brought by the head of the *Mutt* to recover possession of the leased properties.

Mr Justice Miller states thus the question for determination :—

> The principal question, a question which arises in both the appeals, is whether the suit is barred by limitation It is conceded for the appellants that the lease is in excess of the powers of the matathipathe, and their contention is that the suit is barred because limitation must run from the date of the alienation in 1872 the lease being void, or at the latest from the death of Sukgnana Nidhi Swamiar in 1890 '

The learned Judges held in substance that there was no specific trust that the properties were given or endowed generally for the performance of the worship of the deities in the *Mutt* and other attendant duties and for the support of the superior and his disciples, that a lease granted by him was valid for his life, and if adopted by his successor would enure during his term of office, but neither the original alienation nor the subsequent adoption would create a bar by adverse possession.

These cases deal exclusively with the position of the superior of a *Mutt* in relation to its endowment. But there are some others respecting the powers of the managers of religious institutions generally. In *Mahomed* v *Ganapati*† a lease was granted by the *dharmakarta* of a temple; and the suit to recover the leased lands was brought by his successor in office. The defence was limitation, running from the date of alienation. Mr. Justice Sheppard (Muthusami Ayyar, J. concurring) held as follows :—

> ' In the present case, though the plaintiff may in point of time have succeeded the *dharma karta* who made the alienation, he does not derive his title from that *dharma karta* and is, therefore, not bound by his acts Subject to the law of limitation, the successive holders of an office, enjoying for life the property attached to it, are at liberty to question the dispositions made by their predecessors (*Papaya* v *Romana, Jamal Saheb* v *Murgaya Swami, Modho Kooiy* v *Telait Ram Chundci Singh*), and it is equally clear that time runs against the successor who challenges his predecessor's disposition, not from the date of the disposition, but from the date of the predecessor's death, when only the successor became entitled to possession Accordingly, Raman Pujari having died so recently as 1885 the plaintiff's suit cannot be barred by limitation."

This was followed in *Sathianama Bharate* v. *Saravanabaga Ammal* ‡ In this case the superior is called the " manager."

In *Chockalingam Pillai* v. *Mayandi Chettiar*§ it was conceded that " the manager for the time being had no power to make a

* I L. 38 Mad , 356.
† I L. 13 Mad., 277.
‡ I L 18 Mad., 266.
§ I L. 19 Mad , 485

permanent alienation of temple property in the absence of proved necessity for the alienation." But from the long lapse of time between the alienation and the challenge of its validity, coupled with other circumstances, the learned Judges came to the conclusion that necessity may reasonably be presumed.

From the above review of the general law relating to Hindu and Mahommedan pious institutions it would *primâ facie* follow that an alienation by a manager or superior by whatever name called cannot be treated as the act of a "trustee" to whom property has been "conveyed in trust" and who by virtue thereof has the capacity vested in him which is possessed by a "trustee" in the English law. Of course, a Hindu or a Mahommedan may "convey in trust" a specific property to a particular individual for a specific and definite purpose, and place himself expressly under the English law when the person to whom the legal ownership is transferred would become a trustee in the specific sense of the term.

But the respondents rely on three decisions of the Indian Courts in support of their contention that persons holding properties generally for Hindu and Mahommedan religious purposes are to be treated as "trustees." The first is a decision of the Bombay High Court in *Dattagiri* v. *Dattatraya*.* The facts of that case were peculiar. The *Mutt* there was an old one and the dedication was recognised and confirmed by the Mahratta Government. The village was granted to a holy ascetic for the maintenance of a charity attached to the *Mutt*: the governance went by succession to the disciples of the *guru* (the spiritual preceptor or head). In 1871 the village was divided between two disciples, Shivgiri and Shankargiri, in equal moieties, and each held his half separately from the other. In the same year one of them, Shankargiri, sold the lands in dispute to the defendant. In 1897 Shankargiri obtained a Sanad from Government under Act II of 1863 declaring him to be the absolute owner of his share. He died in August, 1897, after appointing the plaintiff as his successor, who in 1898 brought an action to recover possession of the alienated lands on the ground that Shankargiri had no power to alienate them as they were dedicated property. The defence was firstly that the Sanad had altered the character of the property, and secondly that the suit was barred. The Lower Appellate Court found that the lands in suit were private alienable property and that consequently the action was barred. The first finding was strongly challenged by the plaintiff's counsel on second appeal. He contended that as it was dedicated property its holders from time to time "could not allow the Government to treat it as private property." The learned Judges of the High Court refrained from deciding that point: and confined their attention solely to the question of limitation. They proceeded to deal with the case, as they expressly say, "on the hypothesis that the lands in suit were held by Shivgiri and Shankargiri as heads

* I L. 27 Bom 363

of the *Mutt* and as trustees therefor." On that hypothesis the conclusion at which they arrived was inevitable. The position of the head of the *Mutt* in relation to its property under the Hindu Law, custom and practice, was not considered; he was simply assumed to be a trustee. The pith of the judgment consists in the following words:—" We have then here a suit to recover possession of immovable property conveyed in trust and afterwards purchased from the trustee for a valuable consideration." " Conveyed in trust is hardly the right expression to apply to gifts of lands or other property for the general purposes of a Hindu religious or pious institution. The learned Judges relied on the two decisions of the Allahabad and Calcutta High Courts to which their Lordships will presently refer. The case, however, was practically decided on the exposition of the law in the case of *St. Mary Magdalen, Oxford*, v. *The Attorney-General.** With respect to it they say as follows:—

> " In further support of this conclusion we would also refer to the already cited case of *St Mary Magdalen, Oxford,* v *The Attorney-General,* for though it is a decision on the English statute, still it contains many points of resemblance to the present, and furnishes us with the clearest exposition of the law applicable to cases of this class. We propose to refer to that case in some detail as it probably is not within the reach of most mofussil Courts in this Presidency.

They set out the provisions of Sections 2, 24 and 25, of Will IV c. 27, and then add " the Section (s. 25), it will be seen, corresponds more or less with our Articles 134 and 144 and Section 10 of the Limitation Act."

Speaking with respect, it seems to their Lordships that the distinction between a specific trust and a trust for general pious or religious purposes under the Hindu and Mahommedan law was overlooked, and the case was decided on analogies drawn from English law inapplicable in the main to Hindu and Mahommedan institutions. That case can hardly be treated as authority in the decision of the present controversy.

The case of *Narayan* v. *Shri Rumchandra* reported in the same volume (page 373) only followed the view expressed in *Datragiri* v. *Duttaraya*. But the facts, when examined, show a marked difference in the legal position of the parties in the two cases. The *mulgeni* lease under which the defendant claimed title was granted in 1845, and the suit to set it aside was brought somewhere in 1899. Repeated attempts were made by successive managers of the temple to obtain enhancement of rent, but the suits were invariably withdrawn. There was thus clear acquiescence on the part of successive managers in the validity of the transaction. The case fell within the principle of *Chockalingam Pillai*,† and might well have been decided without disturbance of Hindu Law or usage.

* 6 H.L.C. 189.

† I.L. 19 Mad., 485.

The second decision relied upon in support of the respondents' contention is the case of *Behari Lall* v. *Mahammad Muttaki** which related to a Mahommedan "shrine." The origin and history of these "shrines" or *durgahs*, as they are called, is described compendiously in the judgment in *Piran Bibi* v. *Abdul Karim*† :—

> "The sajjadanashin has certain spiritual functions to perform. He is not only a mutwali, but also a spiritual preceptor. He is the curator of the durgah where his ancestor is buried, and in him is supposed to continue the spiritual line (silsilla). As is well known, these durgahs are the tombs of celebrated dervishes, who in their lifetime were regarded as saints. Some of these men had established khankâhs where they lived and their disciples congregated. Many of them never rose to the importance of a khankâh, and when they died their mausolea became shrines or durgahs. These dervishes professed esoteric doctrines and distinct systems of initiation. . . . . The preceptor is called the pir, the disciple the murid. On the death of the pir his successor assumes the privilege of initiating the disciples into the mysteries of dervishism or sufism. This privilege of initiation, of making murids, of imparting to them spiritual knowledge, is one of the functions which the sajjadanashin performs or is supposed to perform. The endowment is maintained by grants of land to the shrines by pious Moslems. The head of the institution, like that of a khankâh, is called a sajjadanashin. The governance (*towliat*) of the endowment is in his hands; he is a *mutwali*, with the duty of imparting spiritual instruction to those who seek it. The property of the 'shrine' is *wakf* 'tied up in the ownership of God.'"

The appointment of the *sajjadanashin* is regulated by usage and practice. This is referred to in the same judgment :—

> "Upon the death of the last incumbent, generally on the day of what is called the sium or teja ceremony (performed on the third day after his decease), the fakirs and murids of the durgah, assisted by the heads of neighbouring durgahs, instal a competent person on the guddi; generally the person chosen is the son of the deceased or somebody nominated by him, for his nomination is supposed to carry the guarantee that the nominee knows the precepts which he is to communicate to the disciples. In some instances the nomination takes the shape of a formal installation by the electoral body, so to speak, during the lifetime of the incumbent."

The duties in connection with the "shrine," apart from giving spiritual instruction, consist in the due observance of the annual ceremonies at the tomb of the Saint, the distribution of charity at fasts and festivals, the celebration of the birthday of the Prophet, and the performance of other rites and ceremonials prescribed either by the religious law or by usage and practice. Ordinarily speaking, the *sajjadanashin* has a larger right in the surplus income than a *mutwali*, for so long as he does not spend it in wicked living or in objects wholly alien to his office, he, like the *Mohant* of a Hindu *Mutt*, has full power of disposition over it.

In *Behari Lall* v. *Mahammad Muttaki* (*supra*), the plaintiff as *sajjadanashin* sued to set aside certain mortgages executed by his predecessor in office, and dated his cause of action from the

* I.L. 20 Allah., 482.
† I.L. 19 Cal., 203.

time he was appointed as *sajjadanashin*. The learned Judges, on a misconception of the rules of the Mahommedan law and of the judgment of their Lordships in *Jewan Doss Sahoo* v. *Shah Kubeeruddeen*,* held that the *sajjadanashin* was a "trustee." One Judge held that the suit was barred either under Article 134 or Article 144; the two others held that Article 134 was applicable as the mortgages were created by a "trustee."

Their Lordships have to differ from this conclusion. In their opinion this case was not, in view of the considerations set forth above, correctly decided.

As regards the third case, *Nilmony Singh* v. *Jagabandhu Roy*,† the suit was brought by the plaintiff as the *shebait* of a Hindu idol to set aside a *dur-mokurrari* pottah, executed in respect of certain of the *debuttar* lands by two ladies who acted as *shebaits* during his minority. He alleged that he became entitled to sue for possession of the alienated lands on his appointment to the office of *shebait* by a decree of the Court. The material defence was that the claim was barred. It should be observed that the *dur-mokurrari* was created in 1857 and the suit was brought after 1888. In the judgment of the High Court the words *shebait* and trustee are used as synonymous and convertible terms; the expression is always "*shebait* or trustee." Probably the fact that the *shebait* has duties and obligations in connection with the dedication, influenced the employment of the word "trustee" in a general sense. Mr. Mayne uses the expression in the same general sense to connote the same idea. That the learned Judge did not regard the *shebait* as a trustee in the specific sense may be inferred from his indecisive conclusion as to the application of Article 134 to the plaintiff's claim. It is quite clear, however, that the legal position of a *shebait* is quite different from that of a trustee to whom specific property is "conveyed" on a specific trust. In *Prosunno Kumari Debya* v. *Golab Chand Baboo*,‡ where the question for determination was whether a particular transaction challenged as invalid had been entered into for such necessity as would make it binding on the dedication, Sir Montague E. Smith, in delivering the judgment of the Board, scrupulously avoided the use of the confusing word "trustee." Dealing with the powers of the *shebait*, he said as follows:—

> "But notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is in their Lordships' opinion competent for the *shebait* of property dedicated to the worship of an idol, in the capacity as *shebait* and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile litigious attacks and other like objects The power, however, to incur such debts must be measured by the existing necessity for incurring them The authority of the *shebait* of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir as defined in a judgment of this Committee delivered by Knight Bruce, L.J.

* 2 Moo, I.A. 390.
† I L. 23 Cal., 536.
‡ L R. 2 Ind. Appeals, 145.

> " It is only in an ideal sense that property can be said to belong to an idol, the possession and management of it must, in the nature of things, be entrusted to some person as *shebait* or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property at least to as great a degree as the manager of an infant heir. If this were not so the estate of the idol might be destroyed or wasted and its worship discontinued for want of the necessary funds to preserve and maintain them.

The identical question relating to the powers and position of a *shebait* was again before the Board in the case of *Abhiram Goswami*, already referred to.* With regard to the powers of the *shebait*, their Lordships say as follows :—

> " The second question is whether, this being so, the Mohant had power to grant a Mokarari Pottah of the Mouzah It is well settled law that the power of the Mohant to alienate debottar property is, like the power of the manager for an infant heir, limited to cases of unavoidable necessity · *Prosunno Kumari Debya* v. *Golab Chand* In the case of *Konwur Doorganath Roy* v. *Ram Chunder Sen* a Mokarari Pottah of dewattar lands was supported on the ground that it was granted in consideration of money said to be required for the repair and completion of a temple, for which no other funds could be obtained But the general rule is that laid down in the case of *Maharanee Shibessouree Debia* v *Mothooranath Acharjo*, that apart from such necessity ' to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty ' in the Mohant. There is no allegation that there were any special circumstances of necessity in this case to justify the grant of the Pottah of 1860, which on the most favourable construction enured only for the lifetime of the grantor, Prananda, who died in 1891, or of the Pottah of 1896, which, at best, could only be deemed operative during the lifetime of Raghubananda, who died in 1900."

The question came up again for consideration by the Board in the case of *Palaniappa Chetty* v. *Deivasikanony Pandara*.† The suit was instituted by the head of a *Mutt* to recover possession of certain land which formed part of the endowment of a Hindu temple attached to the *Mutt*, and had been granted by his precedessor to the defendant by a perpetual rent-free lease in consideration of a small sum of money paid at the time. The contention in that case was that the alienation was for the benefit of the institution ; that contention was overruled, and the decision proceeded on the basis that the *shebait* was only a manager. Lord Atkinson, delivering the judgment of the Board, further added :—

> " Three authorities have been cited which establish that it is a breach of duty on the part of a shebait, unless constrained thereto by unavoidable necessity, to grant a lease in perpetuity of debottar lands at a fixed rent, however adequate that rent may be at the time of granting, by reason of the fact that by this means the debottar estate is deprived of the chance it would have, if the rent were variable, of deriving benefit from the enhancement in value in the future of the lands leased."

* L.R. 36, I.A., 148.

† L.R. 44, Indian Appeals, 147.

In that case the leased lands were situated in the street of a village ; here they are in the town of Madura.

Reverting then to the judgment in *Nilmony Singh*,* their Lordships think that the expression "trustee" was loosely and, speaking with respect, wrongly applied to the *shebait* in order to bring the case under Article 134. It is to be observed that in none of the three cases was there any examination of the laws and usages governing the respective institutions, or of the Madras decisions, in which the subject had been elaborately considered.

In the present case the character of the endowment in relation to the superior is proved beyond contradiction. It has been found concurrently by both the Courts in India that the endowment was held by the defendant No. 26 for the general purposes of the institution. Considerable stress was laid on behalf of the respondents on the entry in the Inam Register that the dedication was for a specific purpose, viz., the worship of the idol. The Inam proceedings did not create any dedication They were instituted simply with the object of investigating titles to hold lands revenue-free as belonging to valid endowments. The gifts were made long before the Inam proceedings by the Hindu kings or chiefs who then held the country. The purposes of the dedication must therefore be gathered from established usage and practice, and that has been found by the Courts in India. Again, "valuable consideration" forms the essence of both Section 10 of the Limitation Act and of Article 134 of the 2nd Schedule. Even if this were a specific trust, which it is not, it would be ridiculous to hold that the rent reserved in the grant to the second plaintiff was "valuable consideration."

In the Courts below the plaintiffs rested their claim mainly, if not entirely, on Article 134. Before the Board an alternative argument has been advanced. It is contended that the second plaintiff acquired the title he is seeking to establish by twelve years adverse possession under Article 144. That article declares that for a suit "for possession of immoveable property or any interest therein not hereby (*i.e.*, by the schedule) otherwise specially provided for the period of limitation is twelve years from the date when the possession of the defendant became adverse to the plaintiff. In view of the argument it is necessary to discover when, according to the plaintiff, his adverse possession began. He was let into possession by Mohunt No. 1 under a lease which purported to be a permanent lease, but which under the law could endure only for the grantor's life time. According to the well settled law of India (apart from the question of necessity which does not here arise) a Mohunt is incompetent to create any interest in respect of the Mutt property to endure beyond his life. With regard to Mohunt No. 2, he was vested with a power similarly limited. He permitted the plaintiff to continue in possession and received the rent during his life. Such receipt was with the knowledge which must be imputed to him that the tenancy created

* I L. 23, Cal., 536.

by his predecessor ended with his predecessor's life, and can, therefore, only be properly referable to a new tenancy created by himself. It was within his power to continue such tenancy during his life, and in these circumstances the proper inference is that it was so continued, and consequently the possession never became adverse until his death.

There is one other point which deserves notice. The administration of the second Mohunt lasted until 1906. In 1905 however, the Mutt went under the management of the Dewan of the Mysore State, under a power of attorney granted by the Mohunt and his successor, who may conveniently be designated as Mohunt No. 3. Certain persons to whom the second plaintiff had sub-leased the lands for ten years thereupon obtained from the Dewan during the currency of their term a lease for seventeen years. It is a direct lease from the Dewan as holder of a power of attorney from Mohunt No. 3. The lessees thereunder have been in possession for some years prior to this suit, and the object of the present action is not to keep the plaintiff in possession, but to eject these possessors, who hold under a title proceeding from the Dewan and Mohunt No. 3, and to upset the act of administration of Mohunt No. 3. on the ground of rights acquired adversely to the Mutt by lapse of time during the incumbency of Mohunt No. 2.

For the foregoing reasons their Lordships are of opinion that neither Article 134 nor Article 144 applies to this case; that the plaintiffs have acquired no title by adverse possession under either of those Articles; that the judgment and decree of the High Court of Madras must therefore be reversed, and the order of the Subordinate Judge dismissing the suit restored with costs here and of the Appellate Court.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

SRI VIDYA VARUTHI THIRTHA SWAMIGAL

BALUSAMI AYYAR AND OTHER

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